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FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
SEP 23 3 17 PM '93 Washington, D.C. 20554

FCC 93M-609

32447

In re Applications of)	MM DOCKET NO. 93-1071
DAVID A. RINGER)	File No. BPH-911230MA
ASF BROADCASTING CORPORATION)	File No. BPH-911230MB
WILBURN INDUSTRIES, INC.)	File No. BPH-911230MC
SHELLEE F. DAVIS)	File No. BPH-911231MA
OHIO RADIO ASSOCIATES, INC.)	File No. BPH-911231MC
For Construction Permit for)	
an FM Station on Channel 280A,)	
in Westerville, Ohio)	

MEMORANDUM OPINION AND ORDER

Issued: September 21, 1993 ; Released: September 23, 1993

1. Wilburn Industries, Inc. (Wilburn) seeks a ruling on a "Petition to Enlarge Against Shellee F. Davis." They filed their petition on August 23, 1993 and want both financial and fake financial certification issues added against Ms. Davis.

2. Shellee Davis opposed Wilburn's petition on September 8, 1993, and Wilburn replied on September 20, 1993.

Preliminary Ruling

3. Wilburn's enlargement request is late-filed. Timely motions to enlarge issues should have been filed on or before May 24, 1993. See 47 CFR 1.229(b)(2) and 58 F.R. 21580 published April 22, 1993.

4. The thrust of Wilburn's allegations is that Davis' loan letters of December 27, 1991 and March 9, 1992 from the Huntington National Bank in Columbus, Ohio are "accommodation letters" which fail to satisfy the Commission's clear and reasonable requirements. And says Wilburn they first learned that the letters were accommodations during the course of discovery in this proceeding.

5. That contention is rejected. Wilburn could have reasonably ascertained and firmed up their financial allegations within 30 days after the March 9, 1992 letter was issued. Even assuming that Wilburn didn't do their homework in 1992, automatic document production in this case took place on May 10, 1993. So there is no excuse for Wilburn not having their financial

allegations firmed up by June 9, 1993. Wilburn's petition is patently untimely.¹

6. A party has no right to wait until after discovery is completed before moving to enlarge issues against their opponent(s). In fact, the Commission has specifically admonished them not to do so. See Discovery Procedures, 12 FCC 2d 185 (1968) at para 7. This widespread tactic of waiting until after discovery is completed before firming up and pleading enlargement allegations is a procedure that should be discouraged. It prolongs hearings and frequently leads to two-phase and three-phase hearings.²

Ruling

7. Since Wilburn's enlargement request is untimely, their allegations must be analyzed under the Commission's reassessed Edgefield-Saluda doctrine. See Adjudicatory Re-Regulation Proposals, 58 FCC 2d 865 (1976) and 47 CFR 1.229(c). There (at 873-874) the Commission said this:

"...An untimely motion to enlarge will be considered fully on its merits only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. It is expected that this standard will be strictly construed."

¹ Wilburn didn't file their enlargement request against Davis until after the direct case exhibits and been exchanged (August 16, 1993) and after the evidentiary admission session had been held (August 20, 1993). So Wilburn is obviously aiming for a Phase II hearing.

² Under present pleading practice the adjudicatory processors (the Trial Judges, the Review Board, and the Adjudication Division of the General Counsel's office) are giving untimely post-designation enlargement requests run-of-the-mill treatment. We seldom analyze such petitions as they should be analyzed; i.e., akin to an infrequent request for extraordinary relief. Consequently, the filing of untimely post-designation enlargement petitions has become a routine, almost automatic ritual. Thus, we end up squandering judicial system resources, fostering adjudicatory inefficiency, and sanctioning trial by ordeal.

Our nonchalant processing of untimely enlargement requests obviously accrues to the tactical advantage of the RAMBO litigator. It enables him to delay the outcome of the proceeding, and it gives him an additional bargaining chip at the settlement table.

Moreover, it must be kept in mind that granting untimely enlargement changes the basic fabric of the proceeding, reshapes the litigation, and alters the strengths and weaknesses of the parties involved. Adjudicatory processors would do well to give untimely enlargement requests the proverbial "hard look" before granting or denying them.

8. Giving Wilburn's allegations the strict construction they deserve they fail to pass muster. Shellee Davis has developed a "worst case" total budget of \$289,496. The March 9, 1992 Huntington National Bank letter not only qualifies as a reasonable assurance letter, it indicates the Bank's willingness to make \$350,000 available to Shellee Davis to finance her project. When this amount is added to the \$50,000 she has personally committed to the project, she has more than \$100,000 over even her worst-case budgetary needs. So Wilburn hasn't raised any financial questions of probable decisional significance, nor any questions of such substantial importance that they warrant a Phase II hearing.

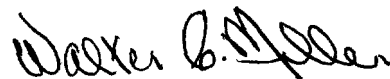
9. Moreover, Wilburn's financial allegations fail to meet the standard laid down in Revised Processing Applications, 72 FCC 2d 202 (1979) at 222 (para.60). They have totally failed to show that Davis has misrepresented her finances or grossly omitted some decisionally significant financial item that would render their proposal totally defective.

10. Even assuming Wilburn's financial allegations were timely filed, they would still be rejected under 47 CFR 1.229(d)'s less stringent standards. Stated simply, Wilburn hasn't pleaded with the required sufficiency and specificity to warrant adding the issues they seek.³

11. For the reasons set out in Paras. 3-10 above, Wilburn's enlargement requests will be denied.

SO the "Petition to Enlarge The Issues Against Shellee F. Davis" that Wilburn Industries filed on August 23, 1993, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Walter C. Miller
Administrative Law Judge

³ 47 CFR 1.229(d) governs timely motions to enlarge issues. It provides in pertinent part that "[s]uch motions shall contain specific allegations of fact sufficient to support the action requested. . ."